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NOTES.

RIGHT OF LESSEE TO RECOVER DAMAGES FOR NUISANCE.—The respective rights of landlord and tenant in regard to maintaining actions to recover damages for a nuisance have recently been considered in *Bly v. Edison Electric Illuminating Co.* (1902) 172 N. Y. 1 a case that has done much to define the law of New York on this perplexing question. The nuisance complained of consisted in the emission of smoke and cinders from defendant's electric light station and in the vibration of plaintiff's house, caused by the running of defendant's machinery. The sole issue was whether the plaintiff was barred from recovering damages because the leases under which she claimed were all made subsequent to the establishment of the nuisance, and a majority of the court held that she was not barred thereby.

It is not disputed that a nuisance affecting the use and enjoyment of property is primarily an injury to possession rather than ownership; but it is equally certain that a reversioner may in some cases have a right of action. The English criterion seems to be the degree of permanence of the nuisance. If it consists in an obstruction of a permanent character, such as a wall, *Jesser v. Gifford* (1767) 4 Burr. 2141, or even a temporary obstruction under a claim of right, *Bell v. Midland Ry. Co.* (1861) 10 C. B., N. S. 287, the reversioner may sue; but if it arises not from the mere presence of a thing but from its use in a particular way, as in case of the ordinary nuisances of smoke or noise, he can recover nothing, even though the value of his reversion has depreciated thereby. *Simpson v. Savage* (1856) 1 C. B., N. S. 347; *Jones v. Chappell* (1875) L. R., 20 Eq. 539. If both landlord and tenant are injured, both may sue and divide the damages between them. *Shelfer v. City of London Electric Lighting Co.; Meux's Brewing Co. v. Same* (1895) 1 Ch. 287.

In New York the first case in which an accurate consideration of this subject was attempted was *Francis v. Schoellkopf* (1873) 53 N. Y. 152. There the plaintiff, owning two houses near a tannery, from which offensive smells proceeded, was allowed to recover only for the loss she had sustained in failing to rent one house and in renting the other at a reduced rate. The court declared the rule of damages to be "the difference of the rental value, free from the stench and subject to it"; and this must be regarded as the New York rule, *Woolsey v. N. Y. Elev. R. Co.* (1892) 134 N. Y. 323, though it has been criticized elsewhere, *East Jersey Water Co. v. Bigelow* (1897) 60 N. J. L. 202.

Though *Francis v. Schoellkopf* had shown a departure from the English view in looking more to the extent of the damages than to the nature of the nuisance, it was not until the decision in *Kernochan v. N. Y. Elev. R. Co.* (1891) 128 N. Y. 559, that a doctrine peculiar to New York was formulated. That case held that where a lease of premises was made subsequent to the construction of an elevated railroad the right of action was exclusively in the lessor, as it was to be presumed that the damages caused by the railroad had been allowed for in fixing the rent. No authorities for the establishment of such a presumption were cited, except two early Massachusetts cases, *Baker v. Sanderson* (1826) 3 Pick. 348, and *Sumner v. Tilton* (1828) 7 Pick. 198, in which there was a reduction of the rent by express agreement during the term on account of the nuisance. The actual grounds of decision in the *Kernochan* case seem to have been that it was not to be supposed that the structure complained of would be removed during the term, and therefore the lessee received and paid for the property in its impaired condition. These views were reaffirmed not only in other elevated railroad cases, *Kernochan v. Manhattan Ry. Co.* (1900), 161 N. Y. 339, but were also believed, by the lower courts, to apply to all cases of continuing nuisances, *Yoss v. City of Rochester* (1895) 92 Hun, 481. The New York rule was thus virtually declared to be that a tenant who comes to a nuisance has no rights at law, whatever may be his standing in equity.

This remarkable conclusion had never been suggested by the English cases, which make no distinction in this respect between a tenant and a purchaser. *Elliotson v. Feetham* (1835) 2 Bing. N. C. 134; *Bliss v. Hall* (1838) 4 Bing. N. C. 183. Nor is it recognized in American jurisdictions. *Sherman v. Fall River Iron Works* (1861), 2 Allen 524; *Smith v. Phillips* (1871) 8 Phila. 10; *Halsey v. Lehigh Valley R. R. Co.* (1883) 45 N. J. L., 26. It appears, indeed, to rest on an entire inversion of the theory of nuisance. A lessee takes his estate with all the easements and rights of light and air thereto belonging, and a disturbance of these rights must be an injury to him. To presume him to have bargained away his right of action in advance is to derogate from the terms of the lease and indulge in arbitrary speculation as to the intention of the parties. Decrease in rent or rental value is a matter of fact, and evidence of damages, not the cause of action itself.

Bly v. Edison Electric Illuminating Co. represents a return by New York to the sounder view, and a restriction of the rule of presumption

laid down in the *Kernochan* case to the special circumstances there found to exist. The *Kernochan* case was distinguished, partly on the ground that an elevated railroad involves the appropriation of an easement rather than the existence of a true nuisance; partly, also, because there was a structure necessarily permanent, unlike the ordinary nuisance, which should never be deemed permanent in theory of law. The latter reason suggests the best basis for a distinction. Though a nuisance may be permanent in the sense that it is likely to continue till abated, yet it is abatable at any time. But an elevated railroad company, or other corporation exercising a quasi-public function and possessing the right of eminent domain, cannot be compelled to cease its operations. All that can be done is to compel it to pay for the property rights it has appropriated. Hence its interferences with the use of property have more than the permanence of the ordinary nuisance; they are really perpetual. In such cases the rule of the *Kernochan* case might be allowed to stand as reasonable and practically just.

PROPERTY RIGHTS IN EXCHANGE QUOTATIONS.—The decision in the recent case of the *Chicago Board of Trade v. The Christie Grain and Stock Co.* (C. C., W. D. Mo., 1902), 116 Fed. 944, which holds that a Board of Trade has property rights in the quotations made on its exchange and gathered through the agency of its employes seems sound. In *Kiernan v. The Manhattan Quotation Tel. Co.* (1876) 50 How. Pr. 194, a press agency had collected financial news abroad and cabled it to New York. While the information was public property in Europe, to which all were entitled, the Court recognized that the labor and expense of collecting and transmitting it made the dispatches in which it was conveyed private property. If the holding were otherwise, no one could prevent the publication of his private dispatches, if they related to public events. The right of any one else to gather the same information in Europe and forward it to America in the same way was conceded. The case was similar to that of the publisher of a business directory, who, it was held, could not reprint the names and addresses given in a rival directory. He must gather them for himself, although with apparently identical results. *Kelly v. Morris* (1866) L. R., 1 Eq. 697.

The publication of such news may or may not make it public property. This depends on whether such publication is general or restricted. Mere transmission to customers, however numerous, does not constitute general publication, if the intent was otherwise. In the principal case, the rules of the Board of Trade showed a clear intention to restrict publication. In the *Kiernan* case, *supra*, the use of the European financial news, during the first thirty minutes after its arrival in New York had been sold by the press agency to X, who had in turn sold its use for the first fifteen minutes to the plaintiff. The latter transmitted it to its customers by "manifold slips" and telegrams. Its property rights in it were upheld on the ground that there had been only restricted publication. Analogies in the representations of otherwise unpublished dramas on the stage and in the receipt of private correspondence suggest themselves. *Palmer v. De Witt* (1872) 47 N. Y. 532; *Woolsey v. Judd* (1855) 4 Duer 379. Equity likewise recognizes property rights in news received from